Supreme Court, U.S.
FILED

031223 FEB 26 2004

No. 03-

In the Supreme Court of the United States

MOUNTAIN ENTERPRISES, INC.,

Petitioner,

v.

DANIEL R. FITCH AND GREGORY ADAM PLUMLEY, CO-ADMINISTRATORS OF THE ESTATES OF TYLER FITCH AND HARLEY FITCH, DECEASED, DANIEL R. FITCH, INDIVIDUALLY, JERRY GALLOWAY, INDIVIDUALLY AND D/B/A GALLOWAY'S TRUCKING, AND BILLY D. KIRK,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Appeals of West Virginia

PETITION FOR A WRIT OF CERTIORARI

EVAN M. TAGER
Mayer, Brown, Rowe & Maw LLP
1909 K Street, N.W.
Washington, DC 20006
(202) 263-3000

ANDREW L. FREY
Counsel of Record
PHILIP ALLEN LACOVARA
SANFORD I. WEISBURST
Mayer, Brown, Rowe & Maw LLP
1675 Broadway
New York, NY 10019
(212) 506-2500

Counsel for Petitioner

QUESTION PRESENTED

In *Kowalski* v. *Tesmer* (No. 03-407, certiorari granted, January 20, 2004), this Court will be considering whether the Fourteenth Amendment requires the States to allow an appeal as of right in criminal cases as part of the process due to an accused before the State may deprive him of his liberty. This case presents a companion issue. Unlike forty-eight other States, only West Virginia (from which this case arises) and New Hampshire deny any appeal as of right to defendants in civil cases, even when, as in this case, they face a verdict ordering them to pay millions of dollars in damages. The question presented is:

Whether the Due Process Clause of the Fourteenth Amendment requires States to afford civil litigants at least one appeal as of right to review judgments that award substantial compensatory and/or punitive damages.

PARTIES TO THE PROCEEDING IN THE COURT WHOSE JUDGMENT IS SOUGHT TO BE REVIEWED AND RULE 29.6 STATEMENT

Mountain Enterprises, Inc., was the petitioner in the Supreme Court of Appeals of West Virginia and is petitioner in this Court. Mountain Enterprises, Inc., does business as Lenore Asphalt, Inc., and states that it has no parent corporation and that no publicly held corporation owns 10% or more of its stock.

The respondents in the Supreme Court of Appeals (also respondents in this Court) were Daniel R. Fitch and Adam Plumley, as co-administrators of the Estates of Harley Fitch and Tyler Fitch, deceased, and Daniel R. Fitch, individually.

Two other parties, Jerry Galloway (individually and doing business as Galloway's Trucking) and Billy D. Kirk, were defendants in the West Virginia trial court. These parties did not file petitions for appeal in the Supreme Court of Appeals, but are listed in that court's caption, and thus are assumed to be respondents in that court, cf. S. Ct. R. 12.6, and respondents in this Court, *ibid.*

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

PARTIES TO THE PROCEEDING IN THE COURT WHOSE JUDGMENT IS SOUGHT TO BE REVIEWED AND RULE 29.6 STATEMENT ii

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT 3

REASONS FOR GRANTING THE PETITION 10

I. DUE PROCESS REQUIRES THAT STATES AFFORD CIVIL LITIGANTS AN APPEAL AS OF RIGHT WHERE SUBSTANTIAL PROPERTY INTERESTS ARE AT STAKE 11

A. An Important Property Interest Is Implicated By The West Virginia Courts' Imposition Of A Large Money Judgment Upon A Defendant 13

B. West Virginia's Failure To Afford Civil Litigants An Appeal As Of Right Creates An Intolerably High Risk Of Erroneous Deprivation Of A Defendant's Property 14

C. West Virginia's Interest In Avoiding The Costs Entailed By An Appeal As Of Right Does Not Outweigh Defendants' Interest In Protection Against Erroneous Deprivation Of Property 18

TABLE OF CONTENTS – continued

Page

II. THE QUESTION PRESENTED IS SUFFICIENTLY IMPORTANT TO WARRANT THIS COURT'S CONSIDERATION.....20

CONCLUSION 21

APPENDIX

A. West Virginia Supreme Court of Appeals' Order Denying Petition For Appeal (Oct. 29, 2003) 1a

B. West Virginia Supreme Court Of Appeals' Order Denying Reconsideration (Jan. 15, 2004) 3a

C. Circuit Court of Lincoln County's Trial Order And Final Judgment Order (Jan. 31, 2002) 5a

TABLE OF AUTHORITIES

Page(s)

CASES

Ashland Oil, Inc. v. *Caryl*,
497 U.S. 916 (1990) 17

Billotti v. *Dodrill*,
394 S.E.2d 32 (W. Va. 1990) 4

Board of Regents v. *Roth*,
408 U.S. 564 (1972) 13

Burnham v. *Superior Court*,
495 U.S. 604 (1990) 19

Cleveland Bd. of Educ. v. *Loudermill*,
470 U.S. 532 (1985) 13

Estelle v. *Dorrough*,
420 U.S. 534 (1975) *(per curiam)* 11

Flippo v. *West Virginia*,
528 U.S. 11 (1999) *(per curiam)* 16, 17, 20

Griffin v. *Illinois*,
351 U.S. 12 (1955) 11, 12

Honda Motor Co. v. *Oberg*,
512 U.S. 415 (1994) 18

Jones v. *Barnes*,
463 U.S. 745 (1983) 11, 12

Kowalski v. *Tesmer*,
No. 03-407, cert. granted, January 20, 2004 ..... passim

Lawrence v. *Texas*,
123 S. Ct. 2472 (2003) 19

Mathews v. *Eldridge*,
424 U.S. 319 (1976) 13, 18

Mavrikidis v. *Petullo*,
707 A.2d 977 (N.J. 1988) 6

McKane v. *Durston*,
153 U.S. 684 (1894) 11, 12

Mincey v. *Arizona*,
437 U.S. 385 (1978) 17

TABLE OF AUTHORITIES – continued

Page(s)

National Mines Corp. v. *Caryl*,
497 U.S. 922 (1990) 17
Roper v. *Simmons*,
No. 03-633, cert. granted, Jan. 26, 2004 19
Ross v. *Moffitt*,
417 U.S. 600 (1974) 11, 21
Shaffer v. *Heitner*,
433 U.S. 186 (1977) 19
Smith v. *Robbins*,
528 U.S. 259 (2000) 11
State Farm Mut. Auto. Ins. Co. v. *Campbell*,
123 S.Ct. 1513 (2003) 14, 20
Teichert & Son, Inc. v. *Superior Court*,
225 Cal. Rptr. 10 (Cal. Ct. App. 1986) 6
Tesmer v. *Granholm*,
333 F.3d 683 (6th Cir. 2003),
cert. granted sub nom. *Kowalski* v. *Tesmer*,
No. 03-407 ..... 18, 21

STATUTES, RULES AND REGULATIONS

28 U.S.C. § 1257 1
28 U.S.C. § 2403 2
N.H. S. Ct. R. 7 10
S. Ct. R. 29 2
U.S. Const. amend. XIV, § 1 2
W. Va. Const. art. VIII, § 4 4
W. Va. R. App. P. 10 4
W. Va. R. App. P. 11 4
W. Va. R. App. P. 12 4
W. Va. R. App. P. 3 4
W. Va. R. App. P. 5 ..... 4, 9
W. Va. R. App. P. 7 ..... 2, 4, 10
W. Va. R. App. P. 8 4
W. Va. R. App. P. 9 4

TABLE OF AUTHORITIES – continued

Page(s)

MISCELLANEOUS

ADMINISTRATIVE OFFICE OF THE SUPREME COURT OF APPEALS, WEST VIRGINIA COURT SYSTEM 2002 ANNUAL REPORT (May 2003) 15

MARY ANN GLENDON, MICHAEL WALLACE GORDON & PAOLO G. CAROZZA, COMPARATIVE LEGAL TRADITIONS (2d ed. 1999) 18

Note, *Courting Reversal: The Supervisory Role of State Supreme Courts*, 87 Yale L.J. 1191 (1978) 15, 16

P. CARRINGTON, D. MEADOR & M. ROSENBERG, JUSTICE ON APPEAL (1976) 14

R. STERN, APPELLATE PRACTICE IN THE UNITED STATES (2d ed. 1989) 4, 10, 14, 16

RESTATEMENT (SECOND) OF TORTS (1965) 6

PETITION FOR A WRIT OF CERTIORARI

Petitioner, Mountain Enterprises, Inc. ("Mountain"), respectfully petitions for a writ of certiorari to review the order of the Supreme Court of Appeals of West Virginia refusing to hear Mountain's appeal in this case.

Mountain is simultaneously filing a separate petition for a writ of certiorari seeking review of the underlying decision of the Circuit Court of Lincoln County, which is the highest court of the State that actually reviewed Mountain's federal constitutional claims. See Pet. in No. 03-__ ("Cir. Ct. Pet.").

OPINIONS BELOW

The Supreme Court of Appeals of West Virginia denied Mountain's petition for appeal in an unpublished order (App. 1a, *infra*). Mountain's motion for reconsideration of that order was similarly denied in an unpublished order (App. 3a, *infra*).

JURISDICTION

The Supreme Court of Appeals denied Mountain's petition for appeal by an order entered on October 29, 2003 (App. 1a, *infra*), which let stand a final judgment against Mountain that had been entered on February 1, 2002, by the Circuit Court of Lincoln County, West Virginia. The Supreme Court of Appeals denied Mountain's motion for reconsideration by an order entered on January 16, 2004 (App. 5a, *infra*). This Court has jurisdiction to review the order denying the petition for appeal under 28 U.S.C. § 1257(a). On January 21, 2004, Chief Justice Rehnquist granted an extension of the time within which Mountain must file its petition for a writ of certiorari to and including February 26, 2004.

Because the constitutionality of the State of West Virginia's failure to afford civil litigants at least one appeal

as of right is drawn into question by this Petition, 28 U.S.C. § 2403(b) may apply. Pursuant to this Court's Rule 29.4(b), Mountain has served this Petition on the Attorney General of West Virginia.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides in relevant part: "No State shall * * * deprive any person of life, liberty, or property without due process of law * * *."

Rule 7 of the West Virginia Rules of Appellate Procedure ("Rejection Or Allowance Of Appeal") provides:

> (a) Rejection. If the petition for appeal is rejected by the Supreme Court on the ground that the judgment or order is plainly right, no other petition for appeal from that judgment or order shall be permitted. If the petition for appeal is rejected on any other ground, or if no ground be cited in the rejection, the petitioner may renew the petition as many times as he desires during the period prescribed by law for presentation of petitions.
>
> * * *
>
> (c) Allowance. If the petition for appeal is granted:
>
> (1) The Clerk of the Supreme Court shall docket the same and immediately send a copy of the order granting the appeal to the petitioner's counsel, or, if there is no counsel of record, to the petitioner, and to the clerk of the circuit court, who shall retain the same in his records.
>
> (2) The Clerk of the Supreme Court shall forthwith return the record, unless the entire record had been transmitted, to the clerk of the circuit court for

preparation of the record of the case for appeal in accordance with Rules 8 and 9.

(3) The Clerk of the Supreme Court shall then send a copy of the order to all parties appearing of record, other than the petitioner, that they may be heard, and shall also issue any supersedeas which may have been awarded. The Clerk of the Supreme Court shall serve the order upon the parties by mailing the same to the counsel of record for each party, or if there is no counsel of record, to the party at his last known address. Service shall be complete upon mailing. The Clerk of the Supreme Court shall note upon the docket the names of the parties to whom the orders were mailed, with the date of mailing.

(4) The Court may grant a supersedeas or modify the conditions thereof, in accordance with Rule 6.

STATEMENT

This case presents an issue closely related to one this Court has agreed to review in *Kowalski* v. *Tesmer*, No. 03-407, cert. granted, January 20, 2004, concerning the obligations of the States under the Fourteenth Amendment to make available at least one appeal as of right from a final judgment that would deprive a person of liberty or property. In *Kowalski*, the claimed right to appeal involves a deprivation of liberty after a criminal conviction. In this case, Mountain claims a right to have at least one level of appellate review on the merits of a judgment in a civil case assessing millions of dollars in compensatory and punitive damages.

1. The State of West Virginia has no intermediate appellate court and does not afford a civil litigant an appeal as of right to the State's Supreme Court of Appeals. Instead, the State requires that the losing party file a *petition* for

appeal. See W. Va. R. App. P. 3, 5, 7; W. Va. Const. art. VIII, § 4. The State Supreme Court has absolute discretion whether to grant or deny the petition, and it makes this decision without the benefit of the full record. See W. Va. R. App. P. 7, 9; *Billotti* v. *Dodrill*, 394 S.E.2d 32, 37 (W. Va. 1990) (characterizing review of petitions for appeal as having "significant discretionary elements"). In these respects, a petition for appeal resembles a petition for a writ of certiorari in this Court, which normally follows appellate review as of right in a federal court of appeals or a state appellate court. Unlike this Court's discretionary practice, however, a grant of leave to appeal to the West Virginia Supreme Court requires the affirmative vote of a majority of the full five-judge court (unless only four judges are sitting, in which case two votes suffice). See R. STERN, APPELLATE PRACTICE IN THE UNITED STATES, at 14 (2d ed. 1989).

Further, while the petitioner may request an opportunity to present the petition orally, it is in the court's discretion whether to grant or deny the request. See W. Va. R. App. P. 5(a). This opportunity is almost never granted and was not in this instance. Only if a majority of the judges vote to permit an appeal is the case docketed in the State Supreme Court, W. Va. R. App. P. 7(b), the full record assembled, W. Va. R. App. P. 8-9, the appeal fully briefed on the merits, W. Va. R. App. P. 10, and oral argument held, W.Va. R. App. P. 11-12.

In this case, despite Mountain's presentation of several substantial claims of error in its petition for appeal (which we detail presently and which include two claims under the Due Process Clause of the Fourteenth Amendment), the Supreme Court of Appeals denied the petition in a one-sentence order that offered no explanation for the refusal to entertain the appeal. App. 2a, *infra*.

2. This case arose from an April 1999 collision between an asphalt-carrying truck owned by Jerry Galloway and driven by Billy Kirk and an oncoming Lincoln Town Car.

The collision killed the Town Car's driver, Leigh Poindexter, and her two children, Tyler and Harley Fitch. *E.g.*, 5/31/01 Tr. at 90, 97, 98, 102, 107. Petitioner Mountain had hired the trucking company to transport asphalt from Mountain's asphalt plant to a portion of highway in Lincoln County, West Virginia, that Mountain was paving pursuant to a contract with the State. *E.g.*, 6/19/01 Tr. at 102, 105.

The representatives of the minor victims brought suit against Kirk, Galloway, and Mountain in the Circuit Court of Lincoln County.[1] At the jury trial, which lasted several weeks, the cause of the accident was basically undisputed. The truck's left front tire was badly worn and blew out (*e.g.*, 6/6/01 Tr. at 49), causing the truck to swerve over the center-line of the road (*e.g.*, *id.* at 81-82) and collide with, tip over, and land on top of the Town Car (*e.g.*, *id.* at 84). Similarly undisputed was the liability of Galloway (the truck's owner) and Kirk (the driver).

Mountain, on the other hand, steadfastly disputed that it was responsible for the condition of the Galloway truck and consequently denied that it should bear any liability for the victims' deaths.

a. Mountain moved for summary judgment, arguing that it had not itself engaged in any culpable conduct, and could not be held vicariously liable for Galloway's or Kirk's acts because Galloway was an independent contractor. The trial court denied the motion, holding that Mountain was precluded from asserting the independent-contractor defense by three supposed exceptions to the defense: (1) Mountain was performing "inherently dangerous" work; (2) Mountain was performing work requiring a franchise from a public

---

[1] The Estate of the deceased driver of the Town Car, Leigh Poindexter, brought a separate action against the same three defendants, which was settled. Under the settlement, Mountain paid $1,700,000 to Poindexter's Estate.

authority and involving an unreasonable risk of harm to others; and (3) Mountain's contract with the State imposed upon Mountain a non-delegable duty to protect the safety of the public on the highways over which materials were transported to and from the job site. Cir. Ct. Pet. App. 1a, 12a-13a.

Mountain argued that none of these exceptions was applicable. For example, on the first, which is not addressed by any West Virginia cases, Mountain pointed to Section 416 of the RESTATEMENT (SECOND) OF TORTS and to New Jersey and California decisions holding that hauling of asphalt is not an inherently dangerous activity where, as here, there is no direct relationship between the nature of asphalt and the cause of the accident or injuries. See *Teichert & Son, Inc.* v. *Superior Court*, 225 Cal. Rptr. 10 (Cal. Ct. App. 1986); *Mavrikidis* v. *Petullo*, 707 A.2d 977 (N.J. 1988). Mountain argued that the fact that the truck was carrying asphalt as distinct from some other commodity was purely incidental and not causative of the accident. Mountain presented similarly well-supported arguments against applicability of the second and third exceptions to the independent-contractor defense.

Nonetheless, the trial court rejected Mountain's arguments and instructed the jury that Mountain ***must*** be held vicariously liable for any culpable acts committed by Galloway or Kirk. Cir. Ct. Pet. App. 25a.

b. In ruling that the independent contractor defense was unavailable because Mountain was subject to a non-delegable duty, the court held that the contract between Mountain and the State imposed upon Mountain a duty to protect public safety not only at the job site, but also between Mountain's asphalt plant and the job-site. Cir. Ct. Pet. App. 13a. During the trial, the court excluded testimony by the State official who had signed the contract on the State's behalf. Cir. Ct. Pet. App. 23a. This official had testified in his deposition

that the contract did not impose any such duty upon Mountain and did not impose absolute liability for any accidents that might occur in delivering materials to the job site. 6/6/01 Tr. at 132-34.

c. In addition to its defense to liability for compensatory damages, Mountain argued that it could not be held liable for punitive damages because there was insufficient evidence that it had engaged directly in any misconduct or had authorized or ratified the primary wrongdoers' misconduct. As to authorization/ratification, Mountain pointed out that, prior to the accident, it had no knowledge that Galloway or Kirk had been involved in any accidents or had been cited for violations of any motor vehicle laws and similarly was unaware of any problems with Galloway's trucks apart from minor mechanical ones. *E.g.*, 6/4/01 Tr. at 181; 6/14/01 Tr. at 39, 40, 97-98, 106-07, 174.

As to direct liability, Mountain emphasized that, prior to the trial court's ruling about Mountain's supposed duty to protect the public safety away from the project site, the settled industry view, endorsed by the relevant State contracting officer, was that a paving contractor's legal responsibility to protect the safety of the public concerned only the project site, not the public roads leading to that site. 6/6/01 Tr. at 132-34. Mountain accordingly argued that while due process might countenance the imposition of compensatory damages in such circumstances, it would not allow punitive damages for violation of a newly-announced duty. The trial court nonetheless allowed the jury to impose punitive as well as compensatory damages against Mountain. Cir. Ct. Pet. App. 25a-26a.

The jury was presented with a verdict form that posited two bases for assessing punitive damages against Mountain and called for the jury to determine whether one or both were satisfied. The first addressed ratification, the second direct liability. The jury responded affirmatively on both bases,

and noted an amount of $6,000,000 next to each, but never totaled these amounts.

d. Mountain invoked the form's ambiguity and West Virginia's rule of lenity, urging the trial court to construe this ambiguous verdict as calling for a punitive amount of $6,000,000, because the jury may well have intended only this amount to be imposed for Mountain's role in the accident, as opposed to intending to have the two sums added together. There was, after all, only a single injury-causing occurrence and no indication that separate harms had flowed from the conduct underlying the different predicates for punitive liability. Nevertheless, the court instead interpreted the verdict to be for $12,000,000 in punitive damages. Cir. Ct. Pet. App. 34a.

e. Mountain contended that either a $6,000,000 or a $12,000,000 punitive award would be excessive under state and federal law because, *inter alia*, Mountain lacked notice that it was subject to a duty to protect public safety beyond the job site, Mountain's conduct was not willful but at most negligent, and the $6,000,000 in compensatory damages award (together with the $1,700,000 Mountain had paid in settlement of the action brought by the Estate of Leigh Poindexter) was more than adequate to satisfy the deterrent purposes of the punitive sanction. The trial court rejected all of Mountain's arguments and upheld the $12,000,000 punitive award. Cir. Ct. Pet. App. 74a-77a. Added to the roughly $6,000,000 in compensatory damages, this made for a total verdict against Mountain of approximately $18,000,000.

3. After the trial court denied Mountain's post-verdict motions for judgment as a matter of law and/or a new trial, Mountain filed a petition for appeal to the Supreme Court of Appeals, presenting the following issues:

- Whether Mountain was erroneously denied the independent-contractor defense to vicarious liability for compensatory damages.
- Whether the Due Process Clause of the Fourteenth Amendment prohibits imposition of punitive (as opposed to compensatory) damages for violation of a newly-announced duty of care.
- Whether the testimony of the State official regarding the meaning of the public-safety provision in the State-Mountain contract should have been admitted because the contract was ambiguous.
- Whether the ambiguous jury verdict form should have been construed as imposing a $6,000,000 punitive damages award, rather than a $12,000,000 award.
- Whether the punitive damages were in any event grossly excessive under state law and the Due Process Clause of the Fourteenth Amendment.

Mountain further requested an opportunity, pursuant to W. Va. R. App. P. 5, to present oral argument in support of its petition. The court did not grant this request.

On October 29, 2003, the court denied Mountain's petition, stating only that "[u]pon consideration whereof, the Court is of the opinion to and doth hereby refuse said petition for appeal." App. 2a, *infra*.

On November 6, 2003, Mountain filed a motion for reconsideration of that order, arguing that the Due Process Clause of the Fourteenth Amendment requires that States afford civil litigants at least one appeal as of right, especially those litigants who (like Mountain here) have suffered a substantial compensatory and/or punitive damages judgment

in the trial court. The court, again without explanation, denied this motion by order entered January 16, 2004. App. 3a, *infra*.

REASONS FOR GRANTING THE PETITION

Of the fifty States, only West Virginia and New Hampshire fail to afford civil litigants an appeal as of right.[2] This anomalous regime cannot survive contemporary standards for due process of law in civil litigation. In failing to provide even one appellate forum as of right, West Virginia's system furnishes an inadequate process for correcting the errors that one-judge trial courts inevitably make. Moreover, these concerns are enhanced where, as here, that judge is elected and is awarding substantial damages to a local plaintiff at the expense of an out-of-state corporate defendant. The Due Process Clause requires more, especially in cases where the would-be appellant will suffer a substantial deprivation of property resulting from the unreviewed judgment of a single fallible judge.

This is such a case. Mountain faces a judgment of $12,000,000 in punitive damages and roughly $6,000,000 in compensatory damages, yet its several substantial claims of trial-court error were brushed aside without any meaningful consideration of their merits. This Court should grant review and make clear that the Due Process Clause requires that civil litigants in ***every*** State, not just in 48, be afforded at least one appeal as of right in cases where verdicts purport to deprive them of substantial property by awarding large amounts of compensatory and/or punitive damages. Alternatively, the Court should hold the petition pending its decision in *Kowalski* v. *Tesmer*, No. 03-407, cert. granted, Jan. 20, 2004, which presents a similar issue in the criminal context.

---

[2] See STERN, *supra*, at 13, 15; W. Va. R. App. P. 7; N.H. S. Ct. R. 7.

I. DUE PROCESS REQUIRES THAT STATES AFFORD CIVIL LITIGANTS AN APPEAL AS OF RIGHT WHERE SUBSTANTIAL PROPERTY INTERESTS ARE AT STAKE.

This Court has referred in several criminal cases to a "traditional principle that a State is not obliged to provide any appeal at all for criminal defendants." *Ross* v. *Moffitt*, 417 U.S. 600, 606 (1974). See also, *e.g.*, *Smith* v. *Robbins*, 528 U.S. 259, 269 n.5 (2000); *Jones* v. *Barnes*, 463 U.S. 745, 751 (1983); *Griffin* v. *Illinois*, 351 U.S. 12, 20-21 (1955) (Frankfurter, J., concurring); *McKane* v. *Durston*, 153 U.S. 684, 687 (1894).

Nevertheless, no decision by this Court has ever relied on this supposed "principle" to deny any litigant in either a civil or criminal case the right to at least one appeal as of right. Reference to the supposed "principle" was not necessary to the holdings of these cases, because in each case the State *did* provide an appeal as of right. The questions this Court had to decide concerned either the constitutionality of *conditions* placed upon the appeal or the availability of counsel in a *further, post-appeal, discretionary-review* proceeding. See *Smith*, 528 U.S. at 276 (upholding California's procedure for appellate counsel to withdraw from representation upon determining the appeal is meritless); *Jones*, 463 U.S. at 754 (appellate counsel need not raise every non-frivolous issue that his client requests); *Ross*, 417 U.S. at 610 (States need not provide defendant with counsel in a second, discretionary appeal); *Griffin*, 351 U.S. at 22 (Frankfurter, J., concurring) (State may not condition first appeal upon defendant's ability to pay for a trial transcript); *McKane*, 153 U.S. at 686 (State may decide to deny bail pending first appeal).[3]

---

[3] See also, *e.g.*, *Estelle* v. *Dorrough*, 420 U.S. 534 (1975) *(per curiam)* (holding that the constitution is not violated by a State's

In any event, it is highly doubtful that the Court today would take this supposed "principle" literally. As Justice Brennan pointed out in dissent in *Jones*, 463 U.S. at 756 n.1 (citations omitted):

> If the question were to come before us in a proper case, I have little doubt that the passage of nearly 30 years since *Griffin* and some 90 years since *McKane* * * * would lead us to * * * decide that a State must afford at least some opportunity for review of convictions, whether through the familiar mechanism of appeal or through some form of collateral proceeding. There are few, if any, situations in our system of justice in which a single judge is given unreviewable discretion over matters concerning a person's liberty or property, and the reversal rate of criminal convictions on mandatory appeals in the state courts, while not overwhelming, is certainly high enough to suggest that depriving defendants of their right to appeal would expose them to an unacceptable risk of erroneous conviction.

By granting certiorari in *Kowalski* v. *Tesmer* this past January, the Court evidently has decided to reexamine this "principle." This review is particularly appropriate in light of empirical evidence and anecdotal experience showing that, in both criminal and civil cases, there is a relatively high rate of serious error at the trial level. Left without an appellate remedy, tens of thousands of criminal defendants would suffer deprivations of liberty and/or property based on judgments that an appellate court would find fatally flawed. Moreover, the current, virtually uniform practice of the States (and the federal system) providing an appeal as of

---

dismissal of a pending appeal upon the defendant's escape from prison).

right in criminal cases powerfully suggests that modern notions of due process do not allow any State to deny criminal defendants at least one opportunity for appellate review of their convictions.

For similar reasons, it is timely to determine whether contemporary notions of due process in the civil justice system also require an appeal as of right in cases involving substantial damage awards. Just as with the development of procedural due process in the criminal context, this Court has consistently strengthened the constitutional standards for the "process" the States must make available before depriving persons of their property in civil litigation. The due process framework established in *Mathews* v. *Eldridge*, 424 U.S. 319 (1976), involves balancing three factors: (1) "the private interest that will be affected by the official action"; (2) "the risk of an erroneous deprivation of such interest through the procedures used"; and (3) "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Id.* at 335. See, *e.g.*, *Cleveland Bd. of Educ.* v. *Loudermill*, 470 U.S. 532 (1985) (applying these factors and holding that due process required a hearing before school security guard could be terminated "for cause").

Under this kind of analysis, it is now time to hold that due process requires at least one appeal as of right in civil cases involving substantial deprivation of a defendant's property.

A. An Important Property Interest Is Implicated By The West Virginia Courts' Imposition Of A Large Money Judgment Upon A Defendant.

There can be no doubt that a damages judgment, compensatory or punitive, constitutes a deprivation of property within the meaning of the Due Process Clause. See, *e.g.*, *Board of Regents* v. *Roth*, 408 U.S. 564, 571-72 (1972)

(stating that the concept of "property" includes "real estate, chattels, or money" but is not limited just to these forms of property). Indeed, this proposition is so self-evident that this Court routinely analyzes due process challenges to civil litigation procedures without even pausing over the threshold question whether a "property" interest protected by the Due Process Clause exists. This obvious predicate for due-process protection is especially applicable when a jury has been allowed to award punitive damages. See, *e.g.*, *State Farm Mut. Auto. Ins. Co.* v. *Campbell*, 123 S.Ct. 1513, 1520-21 (2003) ("Exacting appellate review ensures that an award of punitive damages is based upon an application of law, rather than a decisionmaker's caprice.") (internal quotation marks omitted).

In this case, of course, Mountain has been subjected to substantial awards of both compensatory (approximately $6,000,000) and punitive ($12,000,000) damages. There can be no question that a trial court's order to transfer these huge sums threatens to deprive Mountain of its constitutionally protected "property." The question is what process is "due" before such an order may take effect.

B. West Virginia's Failure To Afford Civil Litigants An Appeal As Of Right Creates An Intolerably High Risk Of Erroneous Deprivation Of A Defendant's Property.

West Virginia's failure to afford an appeal as of right "runs counter to the 'imperative,' underlying the appellate structures of this country and many others, that a litigant should have a remedy against the possibly arbitrary or erroneous rulings of a one-judge court." R. STERN, APPELLATE PRACTICE IN THE UNITED STATES, at 15 (2d ed. 1989) (quoting P. CARRINGTON, D. MEADOR & M. ROSENBERG, JUSTICE ON APPEAL 132-33 (1976)).

It is self-evident that trial judges commit errors in a significant number of cases. Any state process that leaves

correction of such errors, when substantial property interests are at stake, to a purely discretionary system of appellate review does not reasonably protect those substantial property interests.

West Virginia's appellate reversal rate (when measured against a denominator of *all* civil petitions considered) is lower than the appellate reversal rates in States that do afford an appeal as of right. In the four-year period 1999-2002, the Supreme Court of Appeals of West Virginia granted review of approximately one-third of the civil cases in which parties sought to appeal. See ADMINISTRATIVE OFFICE OF THE SUPREME COURT OF APPEALS, WEST VIRGINIA COURT SYSTEM 2002 ANNUAL REPORT ("2002 ANNUAL REPORT"), at 8 (May 2003) (1999–30%; 2000–29%; 2001–39%; 2002–35%). It defies common experience to believe that the process of discretionary review, culminating in nothing more than a few routine words in an entirely conclusory order, is adequate to identify reliably whether reversible errors have occurred. Inevitably, some significant number of the hundreds of cases left unreviewed on the merits were deprived of the error-correcting function that is the essence of appellate review in modern systems of civil justice.

West Virginia does not publish statistics showing how often its State Supreme Court reverses judgments in the minority of cases in which that court entertains an appeal. Nevertheless, even if one assumes that it reverses in 60% of the cases in which it allows an appeal, the effective reversal rate for *all* cases in which the losing party tried to get appellate review reveals the magnitude of the problem.[4] This

---

[4] The leading study of comparative state high court dispositions calculated that, in the period from 1870 to 1970, the West Virginia Supreme Court of Appeals reversed the judgments in about 58% of cases in which it allowed appeals. See Note, *Courting Reversal: The Supervisory Role of State Supreme Courts*, 87 Yale L.J. 1191, 1215 (1978).

generous assumption of a 60% reversal rate in granted cases would mean that there are reversals in about 20% of all the cases in which civil litigants who seek to appeal from judgments of the West Virginia trial courts.

By contrast, one study has calculated that other, comparable state supreme courts (*i.e.*, those in which there was no intermediate appellate court), where appeals *of right* were allowed reversed the underlying judgments in a far higher proportion of cases. This study, cited in the margin, covered four such States: Maine, Nevada, Rhode Island, and South Dakota. See STERN, at 7 n.14 (listing States that, as of 1988, had no intermediate appellate courts). The study estimated a 35.5% reversal rate for Maine, 32.3% for Nevada, 34.1% for Rhode Island, and 41.5% for South Dakota. See Note, *Courting Reversal: The Supervisory Role of State Supreme Courts*, *supra* n. 4, at 1215. Thus, the *effective* reversal rates for all attempted appeals in West Virginia fall well below the reversal rates in these comparable States. If one makes the reasonable assumption that trial courts in all of these States err with approximately similar frequency, these numbers confirm what is intuitively obvious: By refusing to recognize a right to even one appeal on the merits, West Virginia falls far short of the other States in assuring that the judgments of its elected trial judges are reliable enough to support substantial property deprivations.

Anecdotal experience also casts doubt on the ability of the West Virginia Supreme Court of Appeals' ability to identify substantial errors presented by petitions for appeal. For example, in the context of a 1997 murder prosecution in West Virginia trial court, the defendant moved to suppress evidence on the ground that it was taken from a dwelling the officers had entered without a warrant, in violation of the Fourth Amendment. The trial court denied the motion, "approv[ing] the search as one of a 'homicide crime scene.'" *Flippo* v. *West Virginia*, 528 U.S. 11, 13 (1999) *(per curiam)* (quoting trial-court decision). The defendant filed a petition

for appeal, but the West Virginia Supreme Court of Appeals denied discretionary review. *Ibid.* This Court then reversed the West Virginia trial court's decision summarily, finding that it "squarely conflicts with *Mincey* v. *Arizona*[, 437 U.S. 385 (1978)], where we rejected the contention that there is a 'murder scene exception' to the Warrant Clause of the Fourth Amendment." *Id.* at 12-13. See also *National Mines Corp.* v. *Caryl*, 497 U.S. 922 (1990) (summarily reversing West Virginia trial court in case where West Virginia Supreme Court of Appeals had denied discretionary review); *Ashland Oil, Inc.* v. *Caryl*, 497 U.S. 916 (1990) (same).

Although this Court was able to correct the West Virginia trial court's error in *Flippo*, that surely does not furnish an acceptable solution. Given the substantial demands upon this Court, it cannot be expected to catch all the clear errors that the West Virginia Supreme Court of Appeals overlooks in its discretionary-review process. Moreover, this Court lacks jurisdiction to correct a trial court's errors of *state* law, several of which have been alleged by Mountain in this case. See *supra*, at 8-9. West Virginia defendants, both civil and criminal, must be afforded an appeal as of right so that such errors may be rectified. At bottom, while discretionary review functions perfectly well when employed by a court (such as this Court) that does not sit to correct errors, it is plainly inadequate when employed by a court (such as the West Virginia Supreme Court of Appeals) that stands as a civil litigant's sole recourse for correction of the errors that one-judge trial courts inevitably make with sufficient frequency to be a source of concern.

All but one of the other States recognize that the unacceptably high risk of erroneous deprivation of liberty or property *requires* process in which a losing litigant has a *right* to one level of appellate review of the trial court's judgment. That nearly universal acknowledgment speaks volumes about the kind of process that is "due" in contemporary civil justice systems.

C. West Virginia's Interest In Avoiding The Costs Entailed By An Appeal As Of Right Does Not Outweigh Defendants' Interest In Protection Against Erroneous Deprivation Of Property.

The *Mathews* v. *Eldridge* analysis also requires consideration of the State's interest in refusing to supply a more reliable and careful process. The only countervailing consideration here is cost, but that factor cannot offset the compelling reasons for establishing a system of justice that allows for at least one appeal as of right.

The most obvious indicator of the economic feasibility of affording civil litigants an appeal as of right is the fact that forty-eight States provide one, and only two (West Virginia and New Hampshire) do not.[5] See *Honda Motor Co.* v. *Oberg*, 512 U.S. 415, 426 (1994) (holding that Due Process Clause requires postverdict judicial review of the amount of a punitive damages award because, *inter alia*, such review is afforded by "the federal courts and in every State, except Oregon"); *Ake* v. *Oklahoma*, 470 U.S. 68, 78 (1985) (in recognizing a constitutional right of an indigent criminal defendant to state-funded psychiatric assistance, stating: "Many states, as well as the Federal Government, currently make psychiatric assistance available to indigent defendants, and they have not found the financial burden so great as to preclude this assistance."); *Tesmer* v. *Granholm*, 333 F.3d 683, 700-01 (6th Cir. 2003), cert. granted sub nom. *Kowalski* v. *Tesmer*, No. 03-407 (invalidating Michigan's system for appointment of appellate counsel in criminal cases because,

---

[5] European countries too reflect this consensus that a civil litigant should be afforded at least one appeal as of right. See MARY ANN GLENDON, MICHAEL WALLACE GORDON & PAOLO G. CAROZZA, COMPARATIVE LEGAL TRADITIONS, at 101 (2d ed. 1999) ("Decisions of the ordinary civil and criminal courts of first instance may as a rule be appealed to an intermediate appellate court.").

inter alia, it diverges from the practice followed in all the other States).

More generally, such an overwhelming consensus among the States is strong support for recognizing a federal Due Process right. Indeed, the Court has been prepared to find that the policy of a minority of States can no longer survive national concepts of constitutional Due Process, even when there were far more States in the minority than in this matter, where 48 States (as well as the federal government and all United States territories and possessions) recognize the right to at least one appeal in civil cases, while only two deny it. See *Lawrence* v. *Texas*, 123 S. Ct. 2472, 2481 (2003) (recognizing a due process right to engage in private homosexual conduct, relying, *inter alia*, on the growing consensus among the States that anti-sodomy laws should be repealed or at least not enforced); *Burnham* v. *Superior Court*, 495 U.S. 604, 621-22 (1990) (citing *Shaffer* v. *Heitner*, 433 U.S. 186, 212 (1977)) (suggesting that due process can be "offended by the perpetuation of ancient forms that are no longer justified * * * when the 'perpetuation of ancient forms' is engaged in by only a very small minority of the States"); *Roper* v. *Simmons*, No. 03-633, cert. granted, Jan. 26, 2004 (presenting question, *inter alia*, whether the States' evolving consensus against imposition of capital punishment upon minors warrants a holding that Eighth and Fourteenth Amendments preclude imposing capital punishment upon minors).

At the very least, due process should require that States afford an appeal as of right to review those errors that would, if corrected, result in vacatur or remittitur of a punitive award. Such errors would include not only a claim of excessiveness of the punitive award, but also, for example, a claim that punitive *liability* was not established. On numerous occasions this Court has emphasized the importance of appellate review in evaluating the constitutionality of punitive awards, which impose

punishment (financially and reputationally) and therefore trigger special fairness concerns. See, *e.g.*, *State Farm*, 123 S.Ct. at 1520-21 ("Exacting *appellate* review ensures that an award of punitive damages is based upon an application of law, rather than a decisionmaker's caprice.") (internal quotation marks omitted; emphasis added).

In short, the extra burden of affording an appeal as of right, which is nearly universally viewed as a needed and important component of a fair and adequate system of justice and which virtually all other States voluntarily assume, cannot outweigh the intolerable risk, entailed by West Virginia's system, of erroneous deprivations of substantial property interests.

II. THE QUESTION PRESENTED IS SUFFICIENTLY IMPORTANT TO WARRANT THIS COURT'S CONSIDERATION.

The issue posed by this case affects hundreds or thousands of litigants in the courts of West Virginia and New Hampshire who are denied the right to appeal from judgments ordering them to transfer substantial property to other persons. The importance of the issue is amply illustrated by the facts of this case. Mountain faces an $18,000,000 judgment (including a $12,000,000 punitive award), imposed by a single, locally elected trial judge, and was denied an adequate appellate forum for any of its numerous, substantial claims of error. The absence of an appeal as of right has surely resulted in substantial denials of property and liberty interests in other West Virginia cases as well. See, *e.g.*, *Flippo*, *supra*. Only this Court can require West Virginia to redress the systemic inadequacy of its court system.

The significance of the issue is further demonstrated by this Court's recent grant of certiorari in *Kowalski* v. *Tesmer*, No. 03-407, cert. granted, January 20, 2004. *Kowalski*

presents the question whether the federal Constitution requires the State of Michigan, which provides only a discretionary first appeal to criminal defendants who have pled guilty, to provide indigent defendants with appointed counsel to assist in preparing the petition for such discretionary first appeal. 03-407 Pet., at i. Although there may be equal protection overtones to the issue in *Kowalski* that are not present here, this Court's decision may well turn on the importance of a first appeal in correcting trial-court errors. As the Sixth Circuit observed in its ruling in *Kowalski*, this Court's holding in *Ross*, *supra*, that indigent criminal defendants have no right to appointed counsel in a second-level discretionary appeal, rested on a distinction between first-level appeals and second-level appeals — the former exists primarily to correct errors, the latter to address issues of significant public interest or jurisprudential significance. See *Tesmer* v. *Granholm*, 333 F.3d at 697-98; 03-407 Pet., at 4.

The instant case provides an excellent opportunity for this Court to address the importance of a first appeal in the civil context. This case should be set for review in tandem with *Kowalski*. At the very least, the Court should hold the instant Petition pending its decision in *Kowalski*.

CONCLUSION

The petition for a writ of certiorari should be granted and, if feasible, the case should be set for oral argument in tandem with *Kowalski*. Alternatively, the petition should be held pending this Court's decision in *Kowalski*.

Respectfully submitted.

EVAN M. TAGER
Mayer, Brown, Rowe &Maw LLP
1909 K Street, N.W.
Washington, DC 20006
(202) 263-3000

ANDREW L. FREY
Counsel of Record
PHILIP ALLEN LACOVARA
SANFORD I. WEISBURST
Mayer, Brown, Rowe & Maw LLP
1675 Broadway
New York, NY 10019
(212) 506-2500

FEBRUARY 2004

APPENDIX

APPENDIX A

[DECISION DENYING PETITION FOR APPEAL]
[UNPUBLISHED]

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 29th of October, 2003, the following order was made and entered:

Daniel R. Fitch, and Adam Plumley,
co-Administrators of the Estates of Harley
Fitch and Tyler Fitch, deceased, and
Daniel R. Fitch, individually, Plaintiffs
Below, Respondents

vs.) No. 031470

Mountain Enterprises, Inc., d/b/a Lenore
Asphalt, Inc., a Kentucky corporation,
Jerry Galloway, individually, and d/b/a
Galloway's Trucking, and Billy D. Kirk,
Defendants Below,

Mountain Enterprises, Inc. Petitioner

On a former day, to-wit, July 14, 2003, came the petitioner, Mountain Enterprises, Inc., by A.L. Emch and Gretchen M. Callas, Jackson Kelly, its attorney, and presented to the Court its petition praying for an appeal from a judgment of the Circuit Court of Lincoln County, rendered on the 21st day of October, 2003, with the record accompanying the petition. Thereafter, on the 24th day of July, 2003, came the respondents, Daniel R. Fitch and Gregory Adam Plumley, by H. Truman Chafin and Letitia Neese Chafin, The H. Truman Chafin Law Firm, their

attorney, and presented to the Court their written response in opposition thereto.

Upon consideration whereof, the Court is of opinion to and doth hereby refuse said petition for appeal.

A True Copy

Attest: /s/_____
Clerk, Supreme Court of Appeals

APPENDIX B

[WEST VIRGINIA SUPREME COURT OF APPEALS' ORDER DENYING RECONSIDERATION]

[UNPUBLISHED]

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 15th day of January, 2004, the following order was made and entered:

Daniel R. Fitch and Adam Plumley,
co-administrators of the Estates of Harley
Fitch and Tyler Fitch, deceased, and
Daniel Fitch, individually, Plaintiffs
Below, Respondents

vs.) No. 031470

Mountain Enterprises, Inc., dlb/a Lenore
Asphalt, Inc., a Kentucky corporation,
Jerry Galloway, individually and d/b/a
Galloway's Trucking, and Billy D. Kirk,
Defendants Below,

Mountain Enterprises, Inc., Petitioner

On a former day, to-wit, November 26, 2003, came the petitioner, Mountain Enterprises, Inc., by A. L. Emch, Jackson Kelly PLLC, its attorney, and presented to the Court its motion in writing for reconsideration of its petition for appeal refused by order of this Court entered on the 29th day of October, 2003.

Thereafter, on the 19th day of December, 2003, came the respondents, Daniel R. Fitch, et al., by H. Truman Chafin and

Letitia A. Chafin, their attorneys, and presented to the Court their written response in opposition thereto.

Upon consideration whereof, the Court is of opinion to and doth hereby refuse said motion for reconsideration.

A True Copy

Attest: /s/
Clerk, Supreme Court of Appeals

APPENDIX C

[TRIAL COURT TRIAL ORDER AND FINAL JUDGMENT ORDER]

[UNPUBLISHED]

IN THE CIRCUIT COURT
OF LINCOLN COUNTY,
WEST VIRGINIA:

DANIEL R. FITCH, and ADAM PLUMLEY,
Co-Administrators of the Estates of Harley Fitch
and Tyler Fitch, deceased and DANIEL R. FITCH,
individually,

Plaintiffs,

v. CIVIL ACTION NO. 99-C-86

MOUNTAIN ENTERPRISES, INC., d/b/a
Lenore Asphalt, Inc., a Kentucky corporation,
JERRY GALLOWAY, individually and d/b/a
Galloway's Trucking, and BILLY D. KIRK,

Defendants.

TRIAL ORDER AND FINAL JUDGMENT ORDER

On the 21st day of May, 2001 this matter came before the Court for the Court to rule on various pending motions previously argued, and now ripe for decision preparatory for the beginning of the trial of this case. Various motions were granted, and various motions were denied. Among the motions that were granted, was a motion to bifurcate the trial among the plaintiffs, such that William Poindexter as administer of the estate of Leigh Ann Poindexter would have his case heard separately from that of Daniel Fitch and Adam

Plumbley, co-administrators of the estates of Tyler and Harley Fitch.

On the 22nd day of May, various motions and preliminary matters were entertained by the Court, and the parties then proceeded with jury selection for the case of William Poindexter. The Court granted requests for individual voir dire in respect to several jurors. On May 23rd, the Court was prepared to proceed with opening statements, at which time the Court was informed that the parties had again entered into settlement negotiations and that it was believed that a settlement was imminent. The parties then announced to the Court that they had, in fact, reached a settlement of the case.

Whereupon, there was lengthy discussion as to how to proceed with the case of Daniel Fitch and Adam Plumbley. While neither Truman Chafin nor Letitia Neese, counsel for Daniel Fitch and Adam Plumbley, took part in the selection of the jury, Ms. Neese was present during jury selection. After full discussion of the matter among the parties, including Truman Chafin and Letitia Neese, all parties agreed to go ahead with the trial of the case of Daniel Fitch and Adam Plumbley, with the jury that had already been selected.

On the 29th day of May, the Court reconvened to hear a motion for mistrial from Mountain Enterprises, Inc., based upon an improper comment Judge Hoke was alleged to have made in the presence of the jury. Mountain Enterprises, Inc., called Peter Broadbent, III to the stand in support of its motion. After the testimony of Mr. Broadbent the Court enquired of each juror individually as to the comment. No juror recalled any comment of the nature alleged. Mountain Enterprises, Inc., withdrew it motion, at which time, Plaintiffs made a motion for a mistrial and a new jury. The Court refused to call a mistrial as a result of any prejudice plaintiffs may have suffered, and ordered parties to be prepared to proceed with the trial on May 31st.

On may 30th, the Court heard and ruled upon various motions not previously ruled upon as part of the Poindexter side of this case. On May 31st, the parties made opening statements and Plaintiffs first witness, Trooper Danny Chapman was called to the stand. At the conclusion of Trooper Chapman's testimony, Plaintiffs called Mona Dale Koontz. Following the direct examination of Ms. Koontz, the Court adjourned for the day.

On June 4th, the testimony of Ms. Koontz was concluded, and David R. Pesuit was called to the stand. Following Mr. Pesuit, Plaintiffs called Gary Huey. On June 5th, Plaintiffs called Charles Daniel Herman as an adverse witness. Following Mr. Herman's testimony, Plaintiff Daniel R. Fitch was called to the stand. On June 6th, the testimony of Daniel Fitch was concluded and plaintiffs called Dr. Charles Benedick. Following Dr. Benedick, Plaintiff Gregory Adam Plumbley was called to the stand. On June 7th, Plaintiffs called Dr. William Cobb followed by Dr. Daniel Selby. At the conclusion of Dr. Selby's testimony, the Plaintiffs rested.

At the close of the Plaintiffs' case in chief, various motions for a directed verdict were heard and denied by the Court. At the conclusion of the day on June 7th, the parties agreed to allow the Court to call a recess until June 14th, to allow one juror to attend work training in California.

On June 14th, Mountain Enterprises, Inc. began its case in chief calling Claudia Garnet Wheeler to the stand. Following Ms. Wheeler, Mountain Enterprises, Inc., called Rick S. Johnson and David A. Stopper. On June 15th, Mountain Enterprises, Inc. called Robert K. Tinney. Following the testimony of Mr. Tinney, Mountain called its Co-Defendant, Billy Kirk. At that point, due to various problems with the Courthouse electrical system, and in obtaining a court reporter, the trial was not continued until June 19th. On June 19th, Mountain Enterprises, Inc., called Leonard Lawson followed by Roger Griffith. At that point, Mountain

Enterprises, Inc., closed its case, while reserving the right to call an additional one or perhaps two witnesses.

On June 21st, Defendant Jerry Galloway, d.b.a. Galloway Trucking, opened his case in chief and called to the stand Defendant, Jerry Galloway. Following Mr. Galloway's testimony, Mr. Galloway called Charlie White as a witness. Following Mr. White's testimony, Mr. Galloway closed his case in chief. At that time, Defendant, Billy Kirk, informed the Court that he had no additional witnesses to call.

On June 22nd, Defendant, Billy Kirk, opened his case in chief by calling Erma Collier to the stand. After Ms. Collier's testimony, Billy Kirk closed his case in chief. Also on June 22nd, Mountain Enterprises called its additional witness, Camron Lewis. Following this testimony, Mountain Enterprises, Inc., closed it's case-in chief.

On June 25th, Plaintiff's called a rebuttal witness, Jason Price, whose testimony was heard in camera by the Court. The Court then allowed Mountain Enterprises, Inc., to reopen its case in chief, in order to call Dan Cooperridder. Following Mr. Cooperridder's testimony, and Mountain Enterprises, Inc., reclosing its case in chief, Plaintiffs' rebuttal witness, Jason Price testified to the jury.

At the close of evidence, various motions for a directed verdict were made, and the Court denied all of them. On June 27th, the Parties made their closing arguments, and the case was submitted to the jury for a verdict. They returned a verdict in favor of the plaintiffs, as follows:

1. On the issue of Compensatory Damages to the Estate of Harley Fitch:

A. Loss of income of the decedent: $1,300,000.00

B. Loss of services, protection, care and assistance provided by the decedent: $150,000.00

C. Compensation for sorrow, mental

anguish and solace: $1,500,000.00

D. Reasonable funeral expenses $9,214.16

TOTAL OF COMPENSATORY
DAMAGES FOR HARLEY FITCH $2,959,214.16

2. On the issue of Compensatory Damages to the Estate of Tyler Fitch:

A. Loss of income of the decedent: $1,300,000.00

B. Loss of services, protection, care and assistance provided by the decedent: $150,000.00

C. Compensation for sorrow, mental anguish and solace: $1,500,000.00

D. Reasonable funeral expenses $9,214.16

TOTAL OF COMPENSATORY
DAMAGES FOR TYLER FITCH $2,959,214.16

3. On the issue of Punitive Damages:

A. Against Billy D. Kirk: $10,000.00

B. Against Jerry Galloway individually and doing business as Galloway Trucking:

1. for explicitly or implicitly authorizing or ratifying the actions of Billy D. Kirk: $50,000.00

2. for his own individual acts or omissions: $50,000.00

C. Against Mountain Enterprises, Inc. doing business as Lenore Asphalt, Inc::

1. for explicitly or implicitly authorizing or ratifying the actions of Jerry Galloway and/or Billy D. Kirk: $6,000,000.00

2. for its own individual acts or omissions: $6,000,000.00

The jury awarded a Plaintiffs a total of eighteen million, twenty eight thousand, five hundred fifty eight dollars and fifty seven cents ($18,028,558.57).

On August 29th, this Court held a hearing to review the award of punitive damages, in accordance with Garnes v. Fleming Landfill, Inc., 186 W. Va. 6556, (1991). On December 21st, 2001, this Court entered an Order on the review of punitive damages, upholding the jury's verdict, and finding that it was proper. Accordingly, this Court hereby makes the following findings of fact and conclusions of law:

FINDINGS AND CONCLUSIONS

1. That all findings of fact and conclusions of law from this Court's Order regarding the review of punitive damages in this case, entered on December 21st, 2001 are hereby incorporated by reference;

2. That the jury's verdict as outlined above is just and proper and shall be entered as the final judgment in this case; and

3. That therefore, the Court enters judgment in favor of the Plaintiffs, in the amount of eighteen million, twenty eight thousand, five hundred fifty eight dollars and fifty seven cents ($18,028,558.57).

All of which is hereby ADJUDGED, ORDERED and DECREED.

The Clerk of this Court is hereby Ordered to provide a certified copy of this Order to all parties and counsel of record, by USPS First Class Mail, hand delivery or telefax communication.

Entered this /31st/ day of January, 2002 A.D.

[Stamped by Clerk as duly entered Feb. 1, 2002]